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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 10/707,148
Filing Date: November 24, 2003
Appellant(s): CHABOT, RENATA

Ralph D. Chabot
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief (first revised version) filed December 1, 2005 appealing from the Office action mailed May 6, 2005.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

4,431,166	Marshall	02-1984

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 6, 9, and 10 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which appellant regards as the invention.

Regarding claim 6, the metes and bounds of the claim is uncertain. In particular, the limitation "which permits older children and adults to step over" as it is uncertain which children are considered older and which adults are capable of stepping over. Further, since children and adults have many physical characteristics, it would be uncertain whether all children, able or disabled, will infringe on the subject matter. The claim does not appear to cover all instances for all children and adults, especially the elderly, and therefore the claim would be uncertain.

Regarding claims 9 and 10, the claims depend from claim 6 and therefore are indefinite.

Claims 2-10 are rejected under 35 U.S.C. 102(b) as being anticipated by Marshall, 4,431,166.

Regarding claim 2, Marshall discloses, in Figure 1 and 9, a method comprising steps of:

providing low-profile upward extending sections **2**;

appropriately sizing the length and the depth of a sheeting material **6** to substantially conform to a floor (see sizes of Figures 1 and 9); and,

positioning the sheeting material across a portion of the floor. Appellant is reminded that the steps prevent movement of an infant from one area of a house to another and create a barrier to prevent movement of the infant from one area of a house to another by providing the infant with temporary discomfort when the infant touches and applies its own weight to both the top surface of the sheeting material and to at least one of said extending sections (see column 4, lines 59-63). The low-profile upward extending sections extend upward from the top surface of the sheeting material.

Regarding claims 3, 4 and 7-10, at the outset, it should be noted that in method claims, it is the patentability of the method steps that is to be determined and not the recited structure. Structure not affected in the manipulation sense is given no patentable weight.

Regarding claim 5, Marshall discloses, in Figures 1 and 9, a method comprising steps of:

providing a sheeting material **6**;

appropriately sizing the sheeting material **6**; and

positioning the sheeting material **6**, appropriately sized, in a desired location upon a floor.

Appellant is reminded that that in method claims, it is the patentability of the method steps that is to be determined and not the recited structure. Structure not affected in the manipulation sense is given no patentable weight. Furthermore, appellant is reminded that the sheeting material creates a barrier to prevent further movement of an infant in a particular direction. The step of positioning creates a barrier to prevent movement of an infant in a direction across a barrier. The sheeting material has upward extending low profile sections having a top surface design incapable of puncturing the skin of an infant yet will provide temporary discomfort to the infant when the infant touches and applies its own weight to a portion of the sheeting material (see column 4, lines 59-63).

Regarding claim 6, Marshall discloses, in Figures 1 and 9, a method comprising steps of:

providing a sheeting material;

sizing the sheeting material; and,

placing the sheeting material upon a floor in a substantially desired location.

Appellant is reminded that that in method claims, it is the patentability of the method steps that is to be determined and not the recited structure. Structure not

affected in the manipulation sense is given no patentable weight. Appellant is reminded that the sheeting material creates a barrier preventing movement of an infant from one area of a house to another. The sheeting material is sized for older children and adults to step over while still provide sufficient depth to discourage an infant from attempting to cross. Further, the sheeting material has upward extending low profile sections having a top surface design incapable of puncturing the skin of an infant yet will provide temporary discomfort to the infant when the infant touches and applies its own weight to a portion of the sheeting material (see column 4, lines 59-63).

(10) Response to Argument

With respect to the section 112, 2nd paragraph rejection, appellant argues on the first paragraph of page 6 of the brief that "the depth of the barrier is defined as that depth required to prevent an infant from attempting to cross while still allowing older children and adults to step across". In response, appellant is attempting to define the depth based on an user. There is no standardized depth which prevents an infant from attempting to cross while still allowing older children and adults to step across. Accordingly, how does one know when one has reached such depth per infant when infants have different physical characteristics? Further, the claims seek to define the invention based on potential human users. The specification and the claims do not provide the prerequisite to determine if one using the method has obtained such depth. For instance, when a depth is used in a three-month infant, the same depth is uncertain when used with a 9-month infant. Therefore, the depth is based on unknown standard.

With respect to the section 102(b) rejection, appellant has argued that Marshall does not teach or suggest the method; that the examiner misapplied *Ex parte Pfeiffer*; and that the preamble should be treated as a limitation of the claims. In response, is it the examiner's position that Marshall anticipates the steps in the method. Since the steps rather than structure server to define method claims, Marshall anticipates the steps recited in the claims. With respect to *Ex parte Pfeiffer*, this argument is irrelevant as the examiner does not rely on *Ex part Pfeiffer* to reject the claims but rather the reference to Marshall alone. With respect to the preamble, the preamble offers no steps to define the steps already present in the claims.

Appellant further argues that "Marshall defines the range for the depth of the mat to be that which would deter a large dog from knocking over a trash can and that range must also be sufficiently wide so that an adult must step upon the mat in order to get close enough to remove the trash can cover and deposit trash into the can". In response, it is unclear how appellant came to such conclusion when Marshall does not mention any range for the depth in the specification. Further, it is clear that Marshall discloses using the mat against dog; however, the mat and the method is not different than appellant's invention. Appellant has even pointed out that the invention could as well be used with dogs (see paragraph 004 in the specification). Therefore, this is clear evidence that the method of Marshall equally applies to the claimed invention and Marshall, when taking its broadest reasonable interpretation, anticipates the steps.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

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